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IN THE

Supreme Court of the United States

October Term—1952

No. 329

FRANK COSTELLO,

Defendant-Petitioner,

—against—

UNITED STATES OF AMERICA,

Plaintiff.

PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

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Defendant-Petitioner,

—against—

UNITED STATES OF AMERICA,

Plaintiff.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named defendant-petitioner, Frank Costello, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, affirming, in part, a judgment of conviction of the petitioner after a jury trial in the United States District Court for the Southern District of New York.

The judgment of conviction entered on April 8, 1952, was upon ten counts[1] of an eleven count indictment charg-

[1] Count 2 was dismissed by the Trial Court at the close of the Government's case.

ing separate contempts of the United States Senate Crime Investigating Committee in violation of 2 U. S. C. A., Section 192, and for which petitioner received sentences aggregating eighteen months imprisonment and imposition of fines totaling five thousand dollars. The decision of the Court of Appeals was filed on July 3, 1952, reversing conviction on counts 1, 3, 4, 7, 9, 10 and 11 and affirming conviction on counts 5, 6 and 8, which carried the total sentence of 18 months and fines of two thousand dollars.

A petition for rehearing was denied without opinion by the Court of Appeals on August 1, 1952.

Opinion Below

The District Court wrote no opinion. The opinion of the Court of Appeals is not yet reported and is appended hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. A. §1254(1) and Rules 37(b) and 45(a) of the Federal Rules of Criminal Procedure.

Questions Presented

1. Whether the erroneous submission to the jury of counts 1, 3 and 4 and the Trial Court's erroneous rulings and instructions to the jury that petitioner was not lawfully justified in claiming privilege against self-incrimination so prejudiced the jury in its consideration of counts 5, 6 and 8, as to deprive petitioner of his constitutional right to a fair trial. (Treated in Point I of the subjoined brief.)

2. Whether as a matter of law there could be any contempt where the witness, after his refusal, promptly testified and the Committee was not actually obstructed in its investigation. (Treated in Point II.)

3. Whether defendant was deprived of a fair trial by the erroneous exclusion of certain evidence which constituted strong proof of defendant's good faith and of the absence of wilfulness. (Treated in Point III.)

4. Whether a prosecution of a witness for contempt in wilfully refusing to testify is authorized under 2 U. S. C. A. Section 194, where the Senate resolution and certification limited the finding of contempt to the refusal of the witness "to answer certain questions". (Treated in Point IV.)

5. Whether the sentence imposed was in excess of the penalty provided in 2 U. S. C. A., Section 192. (Treated in Point V.)

Statutes Involved

2 U. S. C. A. §§192 and 194 (R.S. 102 and 104, as amended by the Act of June 22, 1938, 52 Stat. 942) provide as follows:

> §192: "*Refusal of witness to testify.* Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question

pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

§194: "*Witnesses failing to testify or produce records.* Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned, refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."

Statement

The contempt charges arose out of petitioner's appearance as a witness before the Senate Special Committee to Investigate Organized Crime in Interstate Commerce.

Indictment

The indictment contained eleven counts charging separate offenses under 2 U. S. C. A. §192. Count 1 charged petitioner with his refusal on March 13th, 1951 to answer a question concerning his net worth. Counts 2 (dismissed by Trial Court), 3 and 4 were based upon petitioner's refusal on March 21st, 1951 to answer questions as to his liabilities.[2]

Count 5 charged wilful default on March 15th, 1951, by the termination of petitioner's attendance before the Committee and his departure without leave.[3] Count 6 charged a wilful default in petitioner's refusal to give any testimony on March 15, 1951. Count 7 charged a refusal to answer a question on March 15, 1951, as to whether petitioner was familiar with testimony given the preceding day by one McLaughlin.

Count 8 charged a wilful default in the refusal of petitioner to give any testimony on March 16th, 1951, while Counts 9, 10 and 11 were based upon petitioner's refusal on March 16th to answer questions as to whether he knew William O'Dwyer, James Moran and Frank Bals.

Decision of Court of Appeals

The judgment of conviction on Counts 5, 6 and 8 was affirmed. The conviction on Counts 1, 3 and 4 was reversed on the ground that the petitioner's claim of privilege against self-incrimination was justified and should

[2] The refusal of the petitioner to testify concerning his net worth and liabilities was based upon a claim of privilege against self-incrimination.

[3] The refusal of the petitioner to give testimony on March 15th and 16th (covered by Counts 5 to 11, inclusive) was based upon his claim of illness, because of which he requested and was refused an adjournment of his examination

have been sustained. The conviction on Counts 7, 9, 10 and 11 was reversed on the ground that the contempts involved a multiplication of the refusals to testify, as charged in Counts 6 and 8.[4]

The Facts Concerning Petitioner's Appearances Before the Committee

(Particularly Applicable to the Affirmed Counts 5, 6 and 8)

In response to subpoena petitioner appeared before an Executive Session of the Committee on February 13th, 1952, and testified for two hours. At the outset he was assured that the Committee was well aware of his claim of having been "misrepresented" (as to his true role in society) and that "the purpose of a detailed examination privately" was to give him "every opportunity to establish" his claim (R. 321). At the request of the Committee he returned to an Executive Session on February 15th and testified for six hours, at the conclusion of which he was complimented by counsel of the Committee for having "cooperated" and by the Chairman for "answering most questions forthrightly" and then excused (R. 321).

Pursuant to the request of the Committee petitioner appeared at a public hearing on March 13th, testified for more than six hours, returned to testify on March 14th for three hours and was instructed to appear on March 15th. During his testimony of March 13th and 14th, petitioner answered all questions, except one on March 13th as to his net worth.[5]

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[4] Application for rehearing was duly made to the Court of Appeals, based on Question 1, *infra*, and denied on August 1, 1952.

[5] Senator O'Conor, Acting Chairman, at the conclusion of the March 13th session said, "Here it is, 28 minutes of 6 and he has been on the stand from some time after the beginning of the session of 9:30 this morning, and the only reason I mention those times is to indicate that he has answered a great number of questions and has refused to answer only one" (R. 322-323).

A few days before petitioner's first public appearance on March 13th, the Committee was advised by petitioner's counsel that petitioner was suffering from a severe case of laryngitis but no request was made for an adjournment at that time (R. 322). When petitioner appeared on March 15th, his counsel informed the Committee that petitioner's throat condition was worse, that he was physically and mentally exhausted from the strain of his lengthy questioning of the two preceding days and counsel then made a request for an adjournment until such time as petitioner could properly continue (R. 323-337).

In support of the claim of illness, a certificate of a physician, Dr. Panettieri, bearing date of March 15th, was presented, which stated that he had examined the petitioner that very day, found that he was suffering from an "acute laryngo-tracheitis" and recommended that he "should remain in bed and have complete voice rest for several days" (R. 334-335). The Committee ruled that the certificate failed to show that petitioner was "in danger of any permanent impairment of his health" and directed him to testify (R. 335). Petitioner refused to testify stating that he would not do so until he was well enough; that he was thinking of his "health", wanted "to protect himself" and said further, "When I testify, I want to testify truthfully and my mind don't function" (R. 334).

Acting upon the direction of the Committee, petitioner again appeared on Friday, March 16th. A request was then made for an adjournment until the following Wednesday and in support of this application petitioner submitted a certificate of another physician, Dr. Quick, who had examined the petitioner that morning and which stated:

> "Mr. Frank Costello has had a heavy cold and a laryngitis for nearly two weeks. During this week the laryngitis has gotten steadily worse until he is now unable to talk in sustained conversation and

> any effort in this direction will cause further and continuing danger to larynx * * * but he has been having local and general treatment for ten days—this includes penicillin and aureomycin. Mr. Costello has had a severe throat affliction for which I have treated him over a period of nearly 18 years (R. 340-341).[6]

Again the request to adjourn the examination was denied and the witness was directed to testify despite his assertion, "I don't feel I am fit to answer questions today and answer them truthfully and sensibly" (R. 344). The Committee then asked for and obtained the consent of petitioner to be examined by a physician appointed by the Committee (R. 344).

At the close of that session petitioner was instructed to "continue under subpoena" and counsel for petitioner was informed that he would be advised concerning the arrangements for the medical examination of the petitioner (R. 345).

The following day, Saturday, March 17th, the Committee's physician, Dr. Kernan, examined petitioner and reported by letter that he found no evidence of "acute infection" but that the larynx showed evidence of a "previous extensive disease of the left side", that "this side

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[6] On the trial Dr. Quick testified that the severe throat affliction was cancer of the larynx which he had removed by intensive radiation treatments, the result of which was to leave petitioner a victim of chronic laryngitis (R. 72-74). Although Dr. Quick testified that he had informed petitioner that he could testify for one or two hours, he stated that the larynx showed "some bit more swelling than before and the patient obviously tired, so that the throat looked and, I dare say, felt worse than formerly" (R. 83) and that he found the throat "pretty sharply inflamed" (R. 85). He finally admitted that he had then told the petitioner, "that he had been using his voice too much and I stressed that because with the amount of inflammation present, I was fearful of the possibility of having to put a tracheotomy tube in his neck" (R. 97-98).

of the larynx moves poorly" that "there would be a more than normal strain for this man to talk for long periods" but that he could testify for a reasonable length of time, "such as two hours" (Government's Exhibit 12, p. 10092, original record).[7]

On Monday, March 19th, petitioner appeared before the Committee and resumed his testimony, in the course of which he answered all the specific questions which he had declined to answer on March 15th and 16th (R. 346-348). He continued to testify on March 20th and 21st until finally excused by the Committee. On these last three days he answered all questions, except those relating to net worth and liabilities, on which he persisted in his claim of privilege against self-incrimination.

On March 30, 1951, pursuant to 2 U. S. C. A. §194, the Senate passed Resolution 110 (Defendant's Exhibit K, R. 354, which reads:

> "RESOLVED, That the President of the Senate certify the report of the Special Committee To Investigate Organized Crime in Interstate Commerce of the United States Senate as to the refusal of Frank Costello to answer certain questions in response to subpena duly issued, before the said special committee, together with all the facts in connection therewith, under the seal of the United States Senate, to the United States attorney for the southern district of New York, to the end that the said Frank Costello may be proceeded against in the manner and form provided by law."

[7] As a witness on the trial, Dr. Kernan testified that he was unaware of petitioner's case history except that he knew of the previous cancerous condition (R. 113, 115). He stated that he did not know that the petitioner had considerable voice rest on March 15th and 16th (R. 113-114) and admitted that if the throat showed signs of inflammation and there was evidence of acute laryngitis he would not have permitted petitioner to testify (R. 115).

The report of the Special Committee of the Senate attached to this Resolution, charged in relevant part:

> "as a result of said Frank Costello's refusal to answer the questions pursuant to said inquiry * * * the Committee was prevented from receiving testimony and evidence concerning the matter committed to said Committee in accordance with the terms of the subpena served upon this witness", and that the "Committee was therefore deprived of answers to questions pursuant to the Committee's inquiry * * *", and that the petitioner's "persistent and illegal refusal to answer the aforesaid questions deprived the Committee of necessary and pertinent testimony and places this witness in contempt of the United States Senate".

Attached to the report was a transcript of the proceedings before the Committee relating to the questions involved in all counts.

Reasons for Allowance of Writ

The basic reasons which petitioner urges for the allowance of certiorari are coextensive with the questions presented above and treated fully in the subjoined brief.

The Court of Appeals accepted some of petitioner's points and rejected others, although the latter—to say the least—were fairly arguable and not free from difficulty. Indeed, the first question here presented arises in direct consequence of the ruling of the Court of Appeals that there was no basis to the charges contained in several of the counts, and yet these charges were submitted to the jury by instructions equivalent to a directed verdict of guilty, with ineradicable prejudicial impact.

The multiplication of Congressional activity and the enlarged scope of legislative committee hearings operate to

confer increasing importance upon questions relating to the rights and liabilities of witnesses and the proper administration of justice in connection therewith. An authoritative clarification of the applicable law is desirable, particularly with regard to the substantial questions herein presented.

Petitioner cannot forbear mentioning that he has been subjected to a mass of adverse publicity, which, notwithstanding its utter lack of pertinence to the subject-matter of the prosecution, has undoubtedly militated against the likelihood of a fair trial. The feeling is inescapable that his conviction is the outgrowth of extraneous prejudice and not of the evidence proved against him. A dispassionate consideration of the case leads to the inference that a determination to convict him, of whatever offense and in whatever fashion, permeated and infected the proceedings at virtually every stage. It is scarcely imaginable that the result would have been the same if the individual involved were obscure, unknown or one other than your petitioner.

A background such as this gives added weight and cogency to the arguments advanced in support of the writ, especially those under Questions 1 and 3; where in Question 1 it is claimed that petitioner was deprived of a fair trial by erroneous instructions of the most prejudicial character and where in Question 3 petitioner was deprived of a fair trial by erroneous exclusion of evidence of vital importance in proving his innocence.

It is submitted that the most favorable view to be taken of the Government's case is that it is a close or doubtful one. Petitioner urges that sedulous care should be used to ascertain whether any of his important rights has been withheld or prejudiced, and whether those rights were adjudicated with the same degree of impartiality due to all persons standing before the tribunal of justice.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Court of Appeals had in this cause, to the end that the cause may be reviewed and determined by this Court; that the judgment of the said Court of Appeals in so far as it affirmed judgment of conviction on counts 5, 6 and 8 of the indictment be reversed; and that the petitioner may be granted such other, further and different relief as may seem proper.

Dated: Lewisburg, Pennsylvania, Setpember 10, 1952.

FRANK COSTELLO,
Petitioner.

By GEORGE WOLF,
Attorney for Petitioner.

IN THE

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No.

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Defendant-Petitioner,

—against—

UNITED STATES OF AMERICA,

Plaintiff.

BRIEF IN SUPPORT OF PETITION

POINT I

The evidence adduced, the arguments advanced by the prosecution and the language of the instructions with respect to the several counts of the indictment, the conviction of which was reversed by the Court of Appeals, so clearly prejudiced the defendant in the jury's consideration of the three affirmed counts, as to necessitate a reversal and new trial as to them.

This is a point which arose in consequence of the decision rendered by the Court of Appeals, which affirmed as to counts 5, 6 and 8, while reversing as to counts 1, 3, 4, 7, 9,

10 and 11. The conviction on the latter counts was properly reversed for the reason that the Court of Appeals determined that defendant had been acting within his constitutional rights in refusing to answer the questions set forth in counts 1, 3 and 4, while counts 7, 9, 10 and 11 were merely cumulative, representing multiplied charges of more general acts, not independently punishable.

Particularly as to counts 1, 3 and 4, defendant was gravely prejudiced by the erroneous submission to the jury of the evidence, instructions and arguments which were later held by the Court of Appeals to have no proper place in the proceedings. The Trial Court refused to dismiss these counts but submitted them to the jury with specific instructions that it had overruled the claim of constitutional privilege. This charge made a powerful impression on the jury, for they requested further enlightenment on the point (R. 305). In response (R. 306), the Trial Court instructed them that they were bound to accept the ruling that as a matter of law the claim of constitutional privilege had not been legally or properly asserted and that it had no basis in law.

The position taken by the Court was tantamount to a direction of a guilty verdict on counts 1, 3 and 4. Under the law as given to the jury by the Court and which they were bound to follow, they had no alternative but to convict on those counts. Yet those counts were improperly before the jury, as the Court of Appeals correctly held. Therefore, when the jury approached consideration of the sustained counts, defendant stood before them as an individual already adjudged guilty on counts 1, 3 and 4, with the inevitable prejudice inherent in that status.

The integration of the ten counts in the instructions rendered it virtually impossible for the jury to consider the sustained counts without being prejudiced by the sub-

ject matter of the reversed counts.[8] Although they were admonished in the same supplemental charge not to consider his claim of immunity against him, this Court has clearly indicated that prejudicial effects cannot be overcome by such instructions. See concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States,* 336 U. S. 440.

The assertion of privilege was advanced by defendant as a reason for his refusal to testify. The erroneous instructions inevitably tied in the claim of privilege with the issue of good faith involved in the sustained counts, namely, 5, 6 and 8. Thus, when the Trial Court was charging as to those counts (R. 292-293), the jury was told that it was bound to *"give consideration to the reasons given by the defendant for his acts, as well as the entire testimony of the defendant before the Committee, and the entire proceedings of the Committee which were had before the defendant."* Then the Court stated, *"You must give consideration to these as bearing upon his good faith."* Under the foregoing circumstances it is patent that the jury had no alternative but to weigh what they were told was an unlawful claim of privilege as one of the factors entering into their determination of the cardinal issue of good faith.

If the trial had been limited to counts 5, 6 and 8, the Government would not have been entitled to show any matters pertinent solely to the reversed counts. Proof of

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[8] At the trial, counsel for defendant—recognizing the prejudice engendered by the injection of this erroneous issue—objected in vain to the introduction before the jury of the net worth and liability questions and defendant's claim of privilege as to them, stating (R. 159):

> "Mr. Spence: My basis of objection, sir, is that putting this before the jury creates bias by reason of the fact that the jury are then informed that the witness raised his constitutional privilege on the ground that his answer might tend to incriminate him. I think it is almost impossible for a jury to sit without being prejudiced by the fact that this witness has said that certain evidence might tend to incriminate him."

other crimes was obviously inadmissible (*Boyd* v. *United States,* 142 U. S. 450), and *a fortiori* full proof tending to show a number of other acts on the theory of criminality, —acts which later by force of judicial determination turned out to be no crimes at all,—was likewise reversible error. The jury's attention could not be diverted from these matters, for it was part of their duty and function to resolve the issue of defendant's guilt and to render a verdict accordingly. It is impossible to conceive how the jury ignored and was not influenced by testimony bearing upon alleged independent crimes when it was obliged to render a verdict with respect to those identical accusations. Nor was such prejudice created only by the Trial Court's erroneous instructions and introduction of evidence. Pointed reference to the damaging subjects were made in the opening address on behalf of the Government (R. 11)—which stressed defendant's "illegimate businesses" and "criminal friends and associates"—and the summation by the prosecutor (R. 283)—wherein the same subjects were emphasized and the harmful statement made that the defendant was "stunned by the very thought of where a detailed cross-examination along those lines might lead". The Court of Appeals in its opinion stressed "the obvious income tax implications of the questions asked"—a subject sufficient of itself to arouse hostile feelings against any defendant. If these are all matters not germane to the sustained counts and therefore of a sort to which reference could not be lawfully made on the trial involving only the sustained counts, the affirmance of a conviction, procured in measurable part by the introduction of this incurably prejudicial mass of extraneous matter, certainly should not be permitted to stand.

The adjudged misconduct of the defendant in unlawfully asserting constitutional claim of privilege against self-incrimination could not be separated in the minds of the jury from the defendant's conduct in refusing to testify

and in seeking an adjournment upon a claim of ill health. The erroneous instructions, the harmful evidence and the improper argument served to implant a single, cohesive and indelible effect which precluded a separate fair consideration of the only questions which the jury were entitled to consider. The impact of the prejudicial matter was of necessity so powerful as to impress upon the minds of the jury a persistent image of the defendant as an individual who contemptuously flouted the authority of the United States Senate by his unlawful and unjustified conduct. Since this issue was involved in the *first* three counts and was the *first* to be submitted for consideration to the jury, the prejudicial picture of the defendant was fully and completely developed and sharply defined in the minds of the jury before it entered upon a consideration of his guilt or innocence on counts 5, 6 and 8.

No extended argument is necessary to demonstrate that this was peculiarly a case which the jury should have endeavored to decide, unaffected by improper evidence, arguments, instructions or innuendoes. A meticulous regard should have been had for the traditional safeguards inherent in a fair trial which is the constitutional right of every person accused of crime, regardless of his station in life or his character.

The presumption of prejudice which this Court so emphatically asserted in *Kotteakos* v. *United States,* 328 U. S. 750 and *Krulewitch* v. *United States,* 336 U. S. 440, is eminently applicable herein, for the error may not be considered harmless if upon a consideration of the record the Court entertains a doubt as to whether it influenced the verdict. The law is established, in both civil and criminal cases, that an error affecting but one cause of action or one count may require a new trial as to the others where the jury may have been prejudicially affected or where the ends of justice are served. *Newman* v. *Lynchburg Investment Corp.,* 236 U. S. 692; *People* v. *Mullens,* 292 N. Y. 415;

People v. *Rosenberg,* 293 N. Y. 16; *Commonwealth* v. *Wadley,* 169 Pa. Superior Ct. 490; *Commonwealth* v. *Dyer,* 243 Mass. 472; *People* v. *Gaul,* 233 Ill. 630; 66 C. J. S. 90; 24 C. J. S. 1114. A strong analogy is afforded by the familiar rule as to proof of other crimes. If a mere allusion to a different offense under circumstances where such reference is unauthorized may impair the legality of a conviction, plenary proof of other supposed crimes which are subsequently adjudged to be no crimes at all, must surely be deemed even more damaging.

POINT II

Defendant's refusal to testify on March 15th and March 16th did not in fact obstruct the Committee's inquiry, for promptly thereafter he furnished all evidence sought from him. Consequently, as a matter of law his conduct did not constitute contempt.

Where there is no obstruction, there can be no contempt under 2 U. S. C. A. Section 192. *United States* v. *Bryan,* 339 U. S. 323; *Re Michael,* 326 U. S. 224, 227; *Ex parte Hudgins,* 249 U. S. 378. Since there was a total absence of obstruction the sustained counts (5, 6 and 8) should have been dismissed as a matter of law.

The facts concerning defendant's appearances—stated below in chronological order—show not only complete absence of obstruction on his part, but on the contrary, demonstrate an unusually scrupulous compliance with and respect for the Committee's lawful orders.

On February 13th and 14th defendant testified before the Committee at executive sessions for a total of over eight hours, receiving the commendation of the Committee's chairman and counsel for "answering most questions forthrightly" and for having "cooperated".

On *Tuesday,* March 13th, and *Wednesday,* March 14th, defendant testified at public hearings for a total of more than nine hours, answering all questions except one on March 13th as to his net worth.

On *Thursday,* March 15th, defendant attended the session but refused to testify because of his illness, submitting a physician's certificate and requesting an adjournment until able to testify, and his request for such an adjournment was denied. He declined to answer the specific question as to whether he was acquainted with the testimony of one McLaughlin, which testimony had been given on the preceding day.

On *Friday,* March 16th, defendant again appeared before the Committee at its direction, sought an adjournment until the following Wednesday because of his illness and submitted another doctor's certificate in support of his application. He refused to answer three questions directed towards ascertaining whether he knew William O'Dwyer, James Moran and Frank Bals. At the request of the Committee he consented to submit to an examination by a physician of its choice. At the close of the session defendant was instructed to "continue under subpoena", and his counsel was informed that he would be advised concerning the arrangements for the medical examination.[9]

On the following day, *Saturday,* March 17th, the examination by the Committee's physician actually took place, and he found that there was no evidence of "acute infection" but that the larynx, which showed signs of previous

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[9] It is significant that the Court of Appeals in its opinion concluded that "defendant was excused from the hearing" of March 16th. This conclusion was justified not only by the evidence, but by the failure of the indictment to include the contempt charge based upon a wilful termination of defendant's attendance and departure "without leave" on March 16th—as was done in Count 5 which charged a wilful termination of attendance and departure "without leave" on March 15th.

extensive disease (cancer), moved poorly; and that defendant could testify for a reasonable length of time such as two hours, but no more, without strain.

After having had the benefit of voice rest since March 14th, the defendant on *Monday* through *Wednesday,* March 19th, 20th and 21st, resumed the witness stand and answered all questions, including the four specific questions which he had refused to answer on March 15th and 16th[10] (except the questions relating to his net worth and liabilities).

Thus it is apparent that the Committee was neither obstructed nor impeded, for it elicited from defendant all of the information it desired and without undue delay; and as Counsel for the Committee said in his testimony on the trial (R. 139):

> "Mr. Lane, may I add that I have answered that on the assumption that later on the Committee got the information. If the Committee had not gotten the information at all, it would have impeded its work because the particular information asked for in the questions was pertinent to the proceedings and the Committee needed that information. With-

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[10] The four specific questions were asked by Senator O'Conor and answered by the witness on March 19th, whereupon Committee counsel stated (R. 348), "I take it those are the questions that the witness had previously refused to answer," to which Senator O'Conor replied, "That's correct."

The intent of the Committee to afford defendant an opportunity to answer the questions appears in the minutes of March 20th (R. 349):

> "Senator O'Conor: Very good. Well, Mr. Wolf, it will be recalled that this Committee afforded Frank Costello yesterday the opportunity to answer questions which previously had been propounded, except in this one particular (net worth), if my memory serves me correctly * * * That is the best of my recollection, at least; and it was my intention to do so. This question was not asked (net worth), and the reason it is repeated now is that he may have such an opportunity."

out the information, the Committee could not complete its work in connection with the investigation of Frank Costello and crime in New York City."

The conclusion is irresistible that had defendant yielded to the importunity of the Committee to supply answers to questions as to which he was adamant in his assertion of privilege, he never would have been prosecuted for contempt.[11]

POINT III

The Trial Court committed reversible error in excluding (1) evidence of defendant's subsequent attendance at hearing and answering all proper questions, as well as the Committee's attitude showing absence of obstruction, and (2) the actual testimony of Dr. Panettiere before the Committee with regard to the defendant's physical condition; all of which were pertinent on the issue of intent and good faith.

Under 2 U. S. C. A. Section 192, wilfulness is an essential element of the crimes charged in the sustained counts (5, 6 and 8). This requirement was recognized by the indictment's allegations in each of these counts that the conduct of the defendant was wilful: *Count 5*—that on March 15th defendant "did wilfully make default in that he terminated his attendance before the Committee and departed from its presence without leave", *Count 6*—that on March 15th defendant "did wilfully make default in that he refused to give any testimony whatever pursuant to the question under inquiry" and *Count 8*—that on March 16th defendant "did wilfully make default in that he refused to give any

[11] Ample support for this conclusion is found in the opinion of the Committee's chief counsel attached to the Report, wherein the entire legal advice is devoted to negativing the validity of the claim of privilege (Defendant's Exhibit K, R. 420-421).

testimony whatever pursuant to the question under inquiry." The necessity for a jury-finding of wilfulness as an indispensable condition for a guilty verdict on these three counts was stressed in the instructions of the Trial Court to the jury (R. 292, 301). Consequently, after a jury had determined that the defendant's conduct was not wilful and that he acted in good faith, such finding would have negatived the existence of any intent to obstruct.

Nevertheless, in two instances the Trial Court erroneously excluded evidence which not only had a strong bearing on the issue of intent to obstruct, but if admitted, would have done much toward the establishment with the jury of the good faith of defendant's conduct and his freedom from wilfulness.

(1) The first of these errors relates to the exclusion of evidence dealing with defendant's prompt return to the hearing on March 19th, when the Committee informed him that it intended to give him an opportunity of answering the four questions unanswered on March 15th and 16th and when the defendant availed himself of the opportunity to answer those questions (R. 129-130). On March 19th, at the commencement of the hearing, the Acting Chairman of the Committee announced (R. 346-347):

> "At the conclusion of the hearing the other day, March 15th and 16th, certain questions were asked of the witness, Frank Costello, which the committee would like to have repeated at this time.
>
> • • • • •
>
> "Well, Mr. Wolf, I might say, just in explanation for the reason for propounding the question again, that it is our viewpoint that it might be only fair to afford to the witness the opportunity of making any explanation he desires to make, either to answer the question categorically and then offer any explana-

> tion he desires, and it really is with a view to giving him the opportunity that that question is asked."

Then the same four questions that were asked of the witness on March 15th and 16th were repeated and were all answered (R. 347-348). After the witness had answered all of these questions, the following colloquy occurred between the Chairman and Committee's counsel (R. 348):

> "Mr. Halley: I take it, those are the questions that the witness had previously refused to answer?
> Senator O'Conor: That's correct."

The acquiescent attitude of the Committee toward the witness' conduct of March 15th and 16th was again exhibited on March 20th (R. 349):

> "Senator O'Conor: • • • Well, Mr. Wolf, it will be recalled that this committee afforded Frank Costello yesterday the opportunity to answer questions which previously had been propounded, except in this one particular, if my memory serves me correctly.
> Mr. Wolf: That's right.
> Senator O'Conor: That is the best of my recollection, at least, and it was my intention to do so."

The excluded evidence constituted strong proof of good faith and absence of any intent to obstruct and should have been received. In view of the witness' declared purpose to obtain merely a brief adjournment and to resume his testimony when he was physically able, the facts involved in the excluded proof were of extreme importance. They would have furnished a concrete demonstration of the honesty and good faith of the defendant's expressed intention to return.

In *U. S.* v. *Matot* (CCA 2, 1944), 146 F. 2d 197, the Court considered the admissibility of later declarations of

the defendant as to his intention to make good overdrafts in a prosecution charging wilful misapplication of Federal Bank funds in violation of 12 U. S. C. A. Section 592. The Court of Appeals reversed the conviction, holding the declarations to be admissible as evidence of good faith and absence of wilfulness. The Court, in an opinion of Learned Hand, Cir. J., used language that is quite applicable to the instant case, stating at page 198:

> "It is of course possible that the offer indicated only a change of heart, an effort to avoid the consequences of what he had done; but it was also possible to take another view and read it as confirmation of his denial that he had ever contemplated a fraud, and that he was ready to go to lengths to protect the bank."

There were more impelling reasons for reversal in the instant case than in the *Matot* case, for in the instant case the expressed intention to return as a witness was made at the time when the contempt is alleged to have been committed and could not be regarded as an afterthought as might conceivably be the situation in the *Matot* case. Moreover, while in the *Matot* case the excluded proof consisted of a bare belated declaration of good faith, the instant case involved an *earlier* expression of good faith followed by the timely performance of acts which substantiated and attested the truthfulness of the earlier declarations.

(2) Likewise the Trial Court erroneously excluded other evidence that had an important bearing on the question of the good faith of the defendant's reasons for refusing to testify. Dr. Panettiere's certificate was submitted by the defendant on March 15th and stated that he had examined the defendant on that day and had found him suffering from an "acute laryngo-tracheitis" and recommended that he "should remain in bed and have complete voice rest for several days".

Counsel for the Committee in his testimony on direct examination on the trial stated that on March 16th the defendant was told by counsel for the Committee or its Chairman that Dr. Panettiere had given testimony before the Committee to the effect that the defendant "could testify in an ordinary tone of voice for limited periods of an hour or so without threat to his health" (R. 41) • • • "and that while he had advised him in general to rest, he could so testify under those conditions without harm" (R. 42). The effect of the testimony of counsel for the Committee was to cast considerable doubt on the good faith of defendant's conduct. This testimony tended to reflect upon the validity of Dr. Panettiere's diagnosis and his prescribed treatment, as set forth in his certificate of March 15th. By this testimony, the defendant was portrayed as an individual who had resorted to fraud by the submission of a certificate which he knew was false.

In truth, the actual testimony of Dr. Panettiere before the Committee was at variance with the testimony given by Counsel for the Committee upon the trial. Dr. Panettiere's testimony did not reflect upon, but rather supported the original findings set forth in his certificate. It did not justify the assertion that the defendant could *testify* for limited periods without injury to his health. In his Committee testimony (Deft's Ex. F for Id., R. 350-352) Dr. Panettiere reiterated his medical findings and his prescribed treatment of bed and voice rest for several days. He was not interrogated at all as to the defendant's ability to *testify*. In fact, it would seem that reference to any possibility of defendant's being able to testify was scrupulously avoided. The only testimony as to the ability of the defendant to use his voice was contained in the following (Deft's Ex. F for Id., R. 352):

> "Mr. Halley: Did you order him to stay in bed?
> Dr. Panettiere: I ordered bed rest and voice rest for him for several days.

Mr. Halley: Now, Doctor, in your opinion would he be able to talk for a reasonable period, say, of an hour or so, in an ordinary conversational voice, without undue risk?

Dr. Panettiere: If he didn't put any strain on his larynx, yes.

Mr. Halley: And if he had urgent business requiring him to talk in a reasonable conversational voice for reasonable periods, would you consider that he to postpone [sic] that urgent business?

Dr. Panettiere: I don't believe so."

Defendant's offer of a transcript of Dr. Panettiere's testimony was rejected (R. 125-126, 128, 161, 183-184). Defendant was deprived of a fair trial by the exclusion of this testimony. Apart from any question of its value as proof upon the recollection or veracity of counsel for the Committee, it bore directly on the vital question of intent to obstruct and wilfulness. Without such evidence, the defendant's position of good faith was seriously imperiled, if not destroyed. Only with such evidence could the jury have viewed his conduct in the proper perspective.

The Committee's decision overruling the defendant's request for an adjournment on the ground of ill health was predicated in large measure upon its misinterpretation of Dr. Panettiere's testimony. Had the Committee correctly interpreted the import of the testimony it is fair to assume that it would have reached a different conclusion. In any event, the transcript of testimony should have been admitted as having an important bearing on the question of the absence of obstruction as a matter of law, as well as upon issues of fact.

The Court of Appeals in its opinion justified the exclusion of this evidence on the ground of hearsay, and stated "there was no showing that the doctor was unable to testify at the trial". But the Court obviously overlooked the fact

that the testimony of Dr. Panettiere had been incorrectly described by the principal witness for the Government and that the purpose of its introduction was to correct the manifestly erroneous interpretation of it and to remove the false, damaging and prejudicial impression the misdescription necessarily must have made.

The testimony was not offered nor was it admissible to prove the *truth* of its statements; it was intended as proof of its *contents*. Simply put,—the matter in dispute was as to whether or not Dr. Panettiere's testimony was what Committee's counsel said it was. To determine that fact there could be no better evidence than the actual testimony itself. The availability of Dr. Panettiere as a witness—as indicated in the opinion of the Court of Appeals—could not render the transcript of his testimony inadmissible hearsay. For, if the transcript of Dr. Panettiere's Committee testimony was hearsay, the same criticism (of hearsay) could be leveled at his testimony upon the trial.

There can be no doubt that the transcript should have been received as the most accurate evidence of the testimony. No objection was made to its competency. In fact, the authenticity of the transcript was not disputed but was expressly admitted by counsel for the Committee (R. 125). The only objection and the ground for its exclusion were "that it was not the best evidence" (R. 126).

The objection to the transcript of Dr. Panettiere's testimony as not constituting the best evidence was, of course, untenable. It has been held that when an issue arises as to what was testified in another proceeding, the reporter's transcription constitutes "the best evidence by which such facts could be proven." *Venlinio* v. *United States* (C. C. A. 7), 276 F. 12. The so-called best evidence rule, in its broadest scope was thus laid down in the early case of *Tayloe* v. *Riggs*, 1 Peters 591 (by Mr. Chief Justice Marshall):

> "The rule of law is, that the best evidence must be given of which the nature of the thing is capable;

> that is, that no evidence shall be received which presupposes greater evidence behind, in the party's possession or power."

While the more recent cases tend to limit the best evidence rule to cases where the contents of a writing are to be proved, the stenographer's transcript of testimony given before a Senate committee is placed at least upon a parity, so far as admissibility is concerned, with the recollection of any witness. *Meyers* v. *United States* (App. D. C.), 171 F. 2d 800, cert. den. 336 U. S. 912. On independent principles, defendant herein was entitled, by the proof offered, to offset the prejudicial effect of the prosecution's inaccurate evidence on the same subject. See *Bradley* v. *Adams Express Co.* (C. C. A. 6), 89 F. 2d 641.

POINT IV

The Senate Resolution and Certification pursuant to which defendant was prosecuted were restricted to the refusal "to answer certain questions," so that the affirmed counts of the indictment, predicated upon an alleged different default, should have been dismissed.

In accordance with a line of authoritative cases construing 2 U. S. C. A., Sections 192 and 194, including *Re Chapman,* 166 U. S. 161, *Jurney* v. *MacCracken,* 294 U. S. 125, and *United States* v. *Bryan,* 339 U. S. 323, it is established that the purpose of the statute was to provide "an alternative method of vindicating the authority of Congress to compel the disclosure of facts which were needed in the fulfillment of the legislative function" (Mr. Chief Justice Vinson in *United States* v. *Bryan, supra,* at p. 327). It is clear from these cases that the absence of a certificate authorizing the prosecution is matter of defense (*Re Chapman, supra,* at pp. 667-668). In other words, the appropriate

House must in the first instance determine that a contempt has been committed. Thereupon if it makes the appropriate certification, and not otherwise, the United States Attorney in the district where the supposed contempt was committed is authorized to institute a prosecution. A necessary corollary of the foregoing incontrovertible proposition is that the prosecuting officer may not in his judgment discover other putative contempts and make them a basis for enlarging the permissible scope of the prosecution he has been directed to commence.

The procedure for prosecutions for contempt of Congressional Committees is prescribed by 2 U. S. C. A., Section 194. That statute requires a Committee report to the appropriate House and certification of the statement of facts from the House to the appropriate prosecuting officer. In the instant case this procedure was followed by a report by the Committee to the Senate of the "fact of such failure or failures", accompanied by a legal opinion of its counsel, the adoption by the Senate after vote of a resolution citing defendant for contempt in his "*refusal * * * to answer certain questions*" and the certification to the United States Attorney of "the statement of facts aforesaid" (constituting such failure).

Thus, Senate Resolution 110 required a certification of "the refusal of Frank Costello *to answer certain questions* in response to subpoena duly issued, before the said special committee, *together with all the facts in connection therewith* * * * to the United States attorney" (Defendant's Exhibit K, R. 354). The report attached thereto stated further that by the defendant's refusal to answer the questions "the committee was prevented from receiving testimony and evidence," and that "*his persistent and illegal refusal to answer the aforesaid questions* [annexed thereto] deprived the committee of necessary and pertinent testimony and places this witness in contempt of the United States Senate." (Italics supplied.) The opinion of the Commit-

tee's chief counsel (Defendant's Exhibit K, R. 420-421), also limited the scope of contempt charged, and constituted formal advice and certification that defendant's refusal to answer questions was contemptuous in that the claim of privilege was arbitrary and fanciful rather than asserted in good faith.

Particularly in view of the fact that defendant eventually answered all questions except those with respect to which it was subsequently held that his claim of privilege was lawfully asserted, we submit that the sustained counts of the indictment constituted an unwarranted and unauthorized extension of the prosecution by the United States Attorney to acts or omissions which the Senate had never certified as constituting contempt. The law and the manner in which it has been consistently interpreted by the legislative department itself (see *First National Bank* v. *Missouri,* 263 U. S. 640, 658) compel the conclusion that it is no part of the United States Attorney's function to institute contempt proceedings for acts otherwise than as specifically directed by resolution of the appropriate House. This course is exemplified by various illustrative resolutions such as those in *Townsend* v. *United States,* 95 F. 2d 352, *Re Grunewald* (1952 H. Res. 602) and *Re Buchman* (1952 H. Res. 517).

A comparison of the indictment herein with the underlying resolution of the Senate unmistakably indicates that the only prosecution which the United States Attorney was empowered to set in motion was one predicated upon refusal of the defendant to answer specified questions, the answers to which were ultimately adjudicated to have been privileged, and that the enlargement of the indictment to embrace the affirmed counts was entirely unauthorized, so that a conviction based thereon would necessarily have to be reversed.

It might be inferred from the position taken by the Government, as well as from the opinion of the Court of Ap-

peals[12] that no deliberative action was required of the Senate, but that certification involved a mere ministerial function This interpretation is refuted by the resolution itself, which shows that it was adopted only after a vote of the Senate, a procedure which in turn was in accord with long-established and undeviating custom. The requirement and practice of deliberative action by the Senate was recognized by the Committee Chairman at the hearing attended by defendant on March 16th, the Chairman then making the following announcement:

> "I might explain the proceedings in connection with the matter of contempt before the Committee * * * This hearing is now being held by a subcommittee of the Senate Committee on Organized Crime, which is composed of five members. * * * The procedure will be that Senator Tobey and the chairman, as a committee of two, will make a recommendation to the whole committee, which will then be acted upon, and then that recommendation will be brought up on the floor of the Senate. *If voted*

[12] The Court of Appeals' opinion purported to construe 2 U. S. C. A. Sec. 194 and quoted it in full (see footnote, *infra*, p. vii). However, through some evident inadvertence, the statute was quoted in the form in which it existed prior to the amendments of 1936 and 1938. Those amendments made substantial changes, and it is possible that the Court's interpretation was influenced by the language of the statute prior to amendment. Thus the statute originally provided for reporting and certification whenever a witness "fails to testify." The amended statute, however, omits to specify such a default, but mentions three other types of default, namely, whenever a witness "fails *to appear* to testify," "fails to produce any books" or "fails to answer any question pertinent to the subject under inquiry." Moreover, the old statute gave as the condition for certification that "the *facts* are reported to either House," whereas the new law calls for the reporting and filing of *"a statement of fact constituting such failure."* As amended, the statute quite plainly requires a narrower limitation and definiteness of the precise offense reported for certification, and is more open to the construction of deliberative rather than ministerial action by the Senate.

> *favorably* it is then referred to the United States District Attorney for the district in which the violation took place, which would be Mr. Irving Saypol, the District Attorney for the Southern District of New York" (R. 337; italics ours).

The interpretation placed on the statute by the Court of Appeals would lead to anomalous situations. For instance, one could expect a contempt prosecution (as suggested in the brief of the United States Attorney in the Court of Appeals, p. 12), upon the basis of "a minority report;" or, indeed, despite the fact that the Senate had unanimously voted against it. It can be safely said that since the enactment of the present statute (2 U. S. C. A. Sec. 194), no contempt prosecution has been undertaken without the Senate or House approval after a vote thereon. Rightly so,—for it would be absurd to expect a prosecution for contempt without a majority vote to support it. It is equally absurd to contemplate the prosecution of particular contempt charges which—as herein—were never approved or even voted on by the Senate at all.

POINT V

The sentence imposed was in excess of the penalty provided in 2 U. S. C. A. Section 192.

Under Section 192 wilful default is made a misdemeanor, punishable by a fine of not more than $1,000.00 nor less than $100.00 and imprisonment of not less than one month nor more than twelve months. The sentence on the sustained counts (5, 6 and 8), was a total of eighteen months imprisonment, six months on each of counts 5 and 6 to run concurrently and one year on count 8; with total fines of $2,000.00, $1,000.00 on each of counts 5 and 8 and $100.00 on count 6, the latter fine to be remitted.

The authority of the Committee was thus defined in Senate Resolution 202:

> "* * * authorized and directed to make a full and complete study and investigation of whether organized crime utilizes the facilities of interstate commerce or otherwise operates in interstate commerce in furtherance of any transactions which are in violation of the law of the United States or of the State in which the transactions occur, and, if so, the manner and extent to which, and the identity of the persons, firms, or corporations by which such utilization is being made, what facilities are being used, and whether or not organized crime utilizes such interstate facilities or otherwise operates in interstate commerce for the development of corrupting influences in violation of law of the United States or of the laws of any state" (Gov. Ex. 2).

Each of the questions covered by the eleven counts in the indictment relates generally to the one subject matter under investigation, to wit,—crime. To be relevant, each question asked of the defendant by the Committee was required to relate generally to the same subject.

With but one subject under investigation there could be but one contempt. In fact, Section 192 defines only one offense,—that of contempt,—which may be committed by a wilful default in appearance or by a refusal to answer any pertinent question. Therefore, a sentence of more than $1000 fine and twelve months imprisonment was unauthorized and excessive.

The question here involved has not been passed on by this Court, but there are several cases in the courts below and in the State courts which give support to appellant's contention.

In *United States* v. *Yukio Abe*, 95 F. Supp. 991 (D. C., D. of Hawaii, 1951), the Court upheld the indictment

charging the defendant in a number of counts with refusing to answer each of the questions therein referred to, on the basis of Rule 8, Federal Rules of Criminal Procedure, 18 U. S. C. A. The Court added at page 992:

> "However, as the questions appear to be directed all to one subject of inquiry and the answers were simultaneous during the proceedings, and continuous acts, the indictment therefore charges only one alleged offense." (Citing cases.)

To like effect see *United States* v. *Emspak*, 95 F. Supp. 1012 (D. C., D. C., 1951). In *Maxwell* v. *Rives*, 11 Nev. 213 (1876), the defendant was held in contempt for refusing to answer a number of questions. The Appellate Court reversed on the ground that there was but one contempt. The Court said at page 221:

> "The statute concerning contempts is a penal statute, and must be strictly construed in favor of those accused of violating its prohibitions. Upon that principle at least, if not upon more liberal principles of construction, the mere refusal of a witness to testify on the same trial of the same issue cannot be deemed more than one contempt, no matter how many questions he may refuse to answer. Otherwise, there would be no limit to the amount in which he might be fined. But it is the manifest purpose of the statute to limit the amount of the fine to be imposed for any one contempt of court to the sum of five hundred dollars—a purpose that would be completely frustrated if the court, by repeating or multiplying questions, could multiply contempts. The district judge erred in finding that each separate refusal to answer a question was a distinct contempt; and in imposing fines which, in the aggregate, exceeded five hundred dollars, he exceeded his jurisdiction."

In *Fawick Airflex Co.* v. *United Electrical R. & M. Wkrs.*, 92 N. E. 2d 431 (Ohio App., 1950), the Court held that where the defendant refused to answer three questions, there was but one contempt and accordingly punishment should be restricted to one contempt.

CONCLUSION

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a Writ of Certiorari should be granted.

Dated: New York, N. Y., September 10, 1952.

Respectfully submitted

GEORGE WOLF,
Attorney for Petitioner.

GEORGE WOLF,
JACOB W. FRIEDMAN,
Of Counsel.

APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

FRANK COSTELLO,

Appellant.

Before:

AUGUSTUS N. HAND, CHASE and FRANK,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

From a judgment convicting the defendant of several contempts of the United States Senate Special Committee to Investigate Organized Crime in Interstate Commerce, the defendant appeals. Affirmed in part and reversed in part.

SPENCE, HOTCHKISS, PARKER & DURYEE, *Attorneys for Frank Costello, Defendant-Appellant;* Kenneth M. Spence, Ernest Angell, Julius J. Teller, and Huyler C. Held, Counsel.

MYLES J. LANE, United States Attorney, *for United States of America, Plaintiff-Appellee;* Joseph P. Martin, Chief, Criminal Division, Robert Martin and Stanley D. Robinson, Assistant United States Attorneys, Counsel.

Appendix—Opinion of Court of Appeals

AUGUSTUS N. HAND, *Circuit Judge*:

The Defendant, Frank Costello, was convicted of ten* separate contempts of the United States Senate Crime Investigation Committee, 2 U. S. C. A. §192, and was sentenced to a term of eighteen months imprisonment and to pay a fine of $5,000.

Counts 1, 3 and 4 of the indictment charged the defendant with refusal to answer the following questions: (1) "What is your net worth?", (3) "Do you owe any sums of money in excess of $10,000 to any person?", and (4) "What is the total indebtedness, Mr. Costello?" As to each of these questions, the defendant rested his refusal to answer on the ground that his answers might tend to incriminate him. At the trial the defendant conceded that the Committee was lawfully created and organized; that he was properly subpoenaed; and that the stenographer's minutes of the hearings were accurate. No question was raised as to the relevancy of the questions to the scope of the Committee's inquiry. The only issue presented was whether a privilege against self-incrimination was properly asserted. The court below ruled, as a matter of law, that it was not because the defendant had no "reasonable belief * * * that disclosure or answer would furnish evidence which would tend to incriminate him."

In the recent case of *Hoffman* v. *United States*, 341 U. S. 479, the Supreme Court said that the claim of privilege should be sustained unless it is " * * * '*perfectly clear* from a careful consideration of all the circumstances in the case, that the witness is mistaken and that the answer (s) *cannot possibly* have such a tendency' to incriminate" (341 U. S. at 488). We think it is fairly obvious that under this test, the privilege was validily asserted by the defendant

* The indictment contained an additional charge which was dismissed by the court.

and that the convictions under Counts 1, 3 and 4 must be reversed. The statements of the Committee's counsel as to the subjects concerning which he intended to examine Costello and the Committee's interim report, issued after Costello had testified in active session as to his financial resources, which described Costello as one of the leaders of a major crime syndicate, let alone the obvious income tax implications of the questions asked, could have sufficed to create a reasonable apprehension in the mind of the defendant that his answers might be incriminating. The fact that the defendant had previously stated to the Committee that he "always upheld the Constitution and the laws" did not remove the possibility that answers to specific questions might incriminate and we think that a contrary inference was not permissible. See *People ex rel. Taylor* v. *Forbes,* 143 N. Y. 219, 230, where the New York Court of Appeals, in an opinion by O'Brien, *J.*, said: "The witness * * * (by affirmations of innocence) did not waive his right to remain silent when it was sought to draw from him some fact or circumstance which in his judgment might form another link in the chain of facts and capable of being used under any circumstances to his detriment or peril." Nor did the defendant "Waive" that right when he gave testimony as to his assets or when he agreed to furnish the Committee with a complete financial statement. The position of the defendant in that respect was not unlike that of the bankrupt in *Arndstein* v. *McCarthy,* 254 U. S. 71, and *McCarthy* v. *Arndstein,* 262 U. S. 355. There the bankrupt Arndstein had filed schedules purporting to show his assets and liabilities and had answered certain questions relating thereto but refused to answer over 400 other questions on the ground that his answers might be incriminating. He was committed to jail for contempt, and upon an appeal from the denial of a writ of habeas corpus, the Supreme Court in the first *Arndstein* case held that since the schedules standing alone

did not amount to an admission of guilt or furnish clear proof of crime, " • • • the mere filing of them did not constitute a waiver of the right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him" (254 U. S. at 72). The second *Arndstein* case dealt with the question whether the bankrupt had lost his privilege by having answered without objection similar questions relating to his finances. The court's holding was the same, in other words, that so long as the testimony voluntarily given did not amount to an admission or proof of guilt, the bankrupt " • • • was entitled to decline to answer further questions when so to do might tend to incriminate him" (262 U. S. at 360). It is not contended here, nor is it a fact, that Costello's previous answers constituted an admission or proof of any crime; consequently, he did not by giving them destroy his privilege as to the questions he refused to answer.

The remaining counts of the indictment—5 through 11—relate to the defendant's conduct at hearings held on March 15 and 16, 1951. Counts 5 and 6 of the indictment charged the defendant with wilful default in terminating his appearance before the Committee without leave and in refusing on March 15, 1951, to give any testimony whatever pertinent to the question under inquiry. Count 7 was based on his failure on the same day to answer the question whether he was familiar with the testimony of McLaughlin. When he appeared before the Committee on the morning of March 15, his attorney stated that the defendant was too ill to testify and requested an adjournment of the examination. After colloquy between the Committee and his attorney, Costello refused to give any furthere testimony, saying: "You heard my statement through Mr. Wolf, and I stand by it, and under no condition will I testify from here in, until I am well enough". The chairman, Senator Kefauver, thereupon instructed Mr. Halley, the Committee's counsel, to proceed with the questioning

of the witness and he was asked a question which he refused to answer, but instead reiterated his intention of leaving the hearing-room. At that point, Mr. Halley instructed him as to the seriousness of that act and told him to obtain an affidavit from a physician if he was too ill to give testimony. Costello's attorney thereupon produced a physician's certificate which stated that the defendant was suffering from acute laryngotracheitis and that he should remain in bed. The Committee rejected this certificate and after further colloquy, Costello was directed to answer the question* but he refused and left the room.

Count 8 of the indictment charged that the defendant had wilfully defaulted in refusing to give any testimony whatever at the hearing on March 16. Counts 9, 10 and 11 dealt with his refusal to answer specific questions on that date. On March 16 the physician, whose certificate had been presented to the Committee the day before, appeared before the Committee and testified that in his opinion Costello was capable of testifying for an hour or so a day. The defendant was then called before the Committee and informed of this testimony, but he presented another certificate, this time from his regular physician, stating that in the latter's opinion sustained conversation by the defendant would be dangerous to his health. The defendant requested an adjournment but the Committee refused and proceeded to question him, at which time the following colloquy took place:

> "The Chairman: Well, let's try a few questions and see how we get along.
>
> Go ahead, Mr. Halley.
>
> Mr. Halley: Mr. Costello, did you have a meeting with William O'Dwyer in the year 1942?

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* The exact wording of the question he was directed to answer was: "Mr. Costello, would you state whether or not you are familiar with testimony given yesterday by Mr. Francis McLaughlin?"

Mr. Costello: I refuse to go further with the questioning—answering the questions—until I feel fully well and capable.

The Chairman: Mr. Costello, it wouldn't strain your voice if you just put the mike up a little closer so we could hear.

Mr. Halley: Mr. Costello, do you know Mr. James Moran?

The Chairman: Let's cut the cameras off. Let's not have any noise.

Mr. Costello: I refuse to answer the question.

Mr. Halley: Do you know Mr. James Moran?

The Chairman: Just a minute. You are directed to answer for a short while. I think you can answer a few questions this afternoon.

Mr. Costello: I don't care to answer any questions.

The Chairman: It is not a matter whether you care to answer them, Mr. Costello.

Mr. Costello: I don't feel I am fit to answer any questions today and answer them truthfully and sensibly.

The Chairman: What was the last question?

Mr. Halley: Do you know Mr. James Moran?

Mr. Costello: I couldn't answer the question today.

Mr. Halley: Do you know Mr. Frank Bals?

Mr. Costello: I am not going to answer the question today.

The Chairman: Well, you understand you are being directed to answer these questions?

Mr. Costello: And I am answering them, tell you—

The Chairman: There is no use continuing if he is not going to answer them."

After further discussion it was agreed that the Committee would appoint a physician to examine the defendant and he was excused from the hearing.

We are of the opinion that the convictions on Counts 7, 9, 10 and 11 must be reversed. Each of those counts dealt with the defendant's refusal to answer a specific question put to him after he had flatly refused to give any further testimony on that particular day. Certainly the refusal to testify was an act in contempt of the Committee for which the defendant was subject to the punishment prescribed by the statute. But when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions, each time eleciting the same answer: his refusal to give any testimony. In other words, the contempt was total when he stated that he would not testify, and the refusals thereafter to answer specific questions cannot be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable. Cf. *Maxwell* v. *Rives*, 11 Nev. 213; *Fawick Airflex Co., Inc.* v. *United Electrical, Radio & Machine Workers of America*, 92 N. E. 2d 431 (Ohio App.); *People ex rel. Amarante* v. *McDonnell*, 100 N. Y. S. 2d 463.

It is urged by the defendant that Counts 5, 6 and 8 are also defective for the reason that the resolution of the Senate citing him for contempt, required by 2 U. S. C. A. §194,* was based only on the refusal to answer certain questions and that the indictment must therefore be lim-

* §194. *Witnesses failing to testify.* Whenever a witness summoned as mentioned in section 192 of this title fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for action.

ited to the acts of contempt contained in the resolution, the text of which is quoted in the margin.* It is argued that since there was no charge of wilfulness in the resolution, there could be no indictment based on wilful default. We do not believe that section 194 is to be so construed or restricted. It merely requires a certification of the facts to the appropriate United States Attorney who is charged with bringing the matter before the grand jury. A certification under this section means only that the Senate has elected to have the contempt punished as a misdemeanor; this method is but an alternative one for vindicating the authority of Congress. *Jurney* v. *MacCracken*, 294 U. S. 125. Moreover, the Committee's Report, which set out in full what transpired at the hearings on the instances of the claimed defaults, was attached to the resolution as certified by the Senate. So, under any interpretation of the statute, the resolution was broad enough to support the indictment.

The defendant also attacks Counts 5, 6 and 8 on the ground this his conduct did not obstruct the Committee's inquiry because he later returned and answered all the questions asked of him by the Committee. In support of this contention he argues that his refusal to testify on the 15th and 16th of March was not wilful, but that, in fact, he intended to return when he felt that he was in condition to testify. We think the charge of the trial court and the

* Resolved, That the President of the Senate certify the report of the Special Committee to Investigate Organized Crime in Interstate Commerce of the United States Senate as to the refusal of Frank Costello to answer certain questions in response to subpena duly issued, before the said special committee, together with all the facts in connection therewith, under the seal of the United States Senate, to the end that the said Frank Costello may be proceeded against in the manner and form provided by law. Congressional Record, March 30, 1951, p. 3133.

jury's verdict are a complete answer to this contention. The court charged the jury as follows:

> "• • • when the defendant appeared before the Committee he was required by law to give testimony on all matters pertinent to the inquiry being conducted by the Committee. The law is that a witness does not have the legal right to dictate the conditions under which he will or will not testify, or the conditions under which having appeared he will remain in attendance.
>
> This does not mean, however, that a witness must either remain in attendance or testify when he is physically or mentally unable to do so or where there is reasonable basis for belief by him that by so doing his health would be seriously impaired. That is a question which is within your province to decide and on which the Government has the burden of proof.
>
> You are charged that when the defendant appeared before the Committee he was required by law to remain in attendance and not to depart from the presence of the Committee without leave of the Committee so long as he was physically able to so remain and so long as he was able to do so without reasonable basis for belief by him that his health would be seriously impaired.
>
> • • • • •
>
> To find that the defendant acted wilfully you must find that he did not act in good faith when he left the presence of the Committee, or when he refused to give any testimony. A belief on the part of the defendant that he lawfully could act as he did or the fact that he might have been advised by his attorney

> that he lawfully could act as he did, is no justification for his acts and may not be considered by you in determining whether the defendant acted in good faith."

The court's charge was a correct statement of the law and the jury's verdict is conclusive on the question whether the default was wilfully committed.

Finally, objection is made to the exclusion of certain evidence and to the charge of the court. Evidence that the defendant attended Committee Hearings on March 19, 20 and 21 and was then willing to answer the questions asked of him was offered to show that his previous defaults did not obstruct the investigation. As we have indicated above in our approval of the court's charge to the jury, such evidence was irrelevant and was properly excluded and no mention thereof in the charge was required. The exclusion of the transcript of the testimony before the Committee of Dr. Panettiere was proper as it was clearly hearsay and there was no showing that the doctor was unable to testify at the trial.

The judgment of convictions on Counts 5, 6 and 8 is affirmed and reversed as to Counts 1, 3, 4, 7, 9, 10 and 11.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 329

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 421-429) is reported at 198 F. 2nd 200.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1952 (R. 430), and a petition for rehearing was denied on August 1, 1952 (R. 430-431). On August 22, 1952, Mr. Justice Jackson extended the time for filing a petition for a writ of

certiorari to and including September 15, 1952 (R. 433). The petition was filed on September 11, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2), and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether evidence presented, comments of the prosecutor, and instructions by the trial court, relative to three counts of the indictment as to which petitioner's claim of the privilege against self-incrimination was overruled by the trial court, but sustained by the Court of Appeals, so prejudiced the jury against the petitioner that his conviction for contempt on three other counts, for leaving a Senate Committee without consent, and for refusing to give any testimony at all, cannot be sustained.

2. Whether the fact that a witness subsequently answered questions after he improperly refused to give any testimony before a Congressional committee, prevents his prosecution for contempt on the ground that he has not "obstructed" the Committee.

3. Whether petitioner was deprived of a fair trial by the exclusion of evidence which he alleges tended to show that he was acting in good faith when he refused to testify before the Committee and walked out of the Committee hearing, although he did not offer the evidence to show good faith.

4. Whether the offenses chargeable in an indictment under 2 U.S.C. 192 and 194 are limited by

what is specifically detailed in the Senate resolution certifying the contempt.

5. Whether the offenses of which petitioner has been convicted are separate offenses.

STATUTE INVOLVED

2 U.S.C. 192 and 194, R.S. 102 and 104, as amended by the Act of June 22, 1938, 52 Stat. 942, provide as follows:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.
>
> * * * * *
>
> Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or con-

> current resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

STATEMENT

The petition for a writ of ceritorari seeks review of a judgment sustaining petitioner's conviction on three counts of an indictment charging him with contempt of the special Senate Committee to Investigate Organized Crime in Interstate Commerce (R. 430). The counts on which his conviction was affirmed charged in count 5 (R. 4) that on March 15, 1951, he

> * * * did wilfully make default, in that [he] did terminate his attendance before the aforesaid Committee and depart from the presence of the aforesaid Committee without leave of the aforesaid Committee

in count 6 (R. 4) that on the same day

> * * * then and there * * * did refuse to give any testimony whatever pertinent to the question under inquiry by the aforesaid Committee

and in count 8 (R. 5) that on March 16, 1951, he

> * * * did wilfully make default in that [he] did refuse to give any testimony whatever pertinent to the question under inquiry by the aforesaid Committee.

All of the conduct involved in these three counts was justified by petitioner before the Committee on the basis that his physical and mental condition made it impossible for him to testify properly (R. 326, 328-329, 338-345). In addition, petitioner also indicated on March 15, 1951, that continued testifying would endanger the condition of his throat (R. 334-336).

In partial support of his March 15, claim, petitioner submitted the following certificate from Dr. Vincent J. Panettiere (R. 334-335):

> Mr. Frank Costello of 115 Central Park W. is confined at home in bed. He is suffering from acute laryngotracheitis. He should remain in bed and have complete voice rest for several days. Respectfully submitted. Vincent Panettiere.

The Committee rejected the claim that this statement showed that petitioner was unable to testify without danger to his health, and rejected also pe-

titioner's own claim to this effect. It proceeded to ask him the question set out in count 7 (R. 336). Petitioner refused to answer, and, in violation of the Committee's order to answer that question and "such other questions as will be asked this afternoon" (R. 336), left the Committee hearing room (R. 337).

The following day, March 16, 1951, the Committee heard testimony from Dr. Panettiere (Def. Ex. F, R. 350-353), on the basis of which it concluded that petitioner could testify for a while. It advised petitioner as follows (R. 339):

> Mr. Costello, your physician was in this morning, and testified, as you may know, that you had no temperature; and in his opinion there wasn't any reason why you should not, at least, testify an hour a day; it couldn't do you any harm if you spoke in a moderate voice.
>
> So that, under the continuing subpoena that you are under, we asked you to come back today. We would like to ask you some questions, and, after a reasonable time, in line with what your physician said, if you got tired, or if your throat bothers you too much, if you will let us know, we will carry it over until the next time we meet.

Petitioner offered in evidence the certificate of another physician, Dr. Douglas Quick, who had been treating petitioner, but who was not available

at the time the Panettiere certificate was obtained (R. 339-341). This certificate stated (R. 340-341):

> Mr. Frank Costello has had a heavy cold and a laryngitis for nearly two weeks. During this week the laryngitis has gotten steadily worse until he is now unable to talk in sustained conversation, and any effort in this direction will cause further and continuing danger to his larynx. * * * but he has been having local and general treatment for ten days—this includes penicillin and aureomycin.
>
> Mr. Costello has had a severe throat affliction, for which I have treated him over a period of nearly 18 years .

The Committee concluded that "the certificate does not say that Mr. Costello is not able to testify or that testifying for a short time would injure his health or his throat * * *," and authorized the Committee counsel to proceed (R. 342-343). Petitioner continued to refuse to testify, specifically refusing to answer the questions set out in counts 9, 10, and 11 of the indictment (R. 343-344). At the conclusion of this hearing it was arranged that petitioner would be examined by a physician selected by the Committee (R. 344-345). Petitioner was in fact examined by this physician, Dr. John D. Kernan, the following morning (R. 107-108).

On March 19, 1951, two days later, petitioner again appeared before the Committee and answered the four questions asked him on March 15 and 16 (R. 346-348).

On March 17, 1951, the Committee considered "the testimony and deportment" of petitioner and recommended that he be cited for contempt of the Senate (R. 358). This recommendation, together with a later recommendation arising out of testimony given on March 19, 20, and 21, was approved by the full Senate and made part of a Senate Resolution (No. 110), which was passed by the Senate and thereupon certified to the United States Attorney for the Southern District of New York "to the end that the [petitioner] may be proceeded against in the manner and form provided by law" (R. 354). Attached to the resolution sent to the United States Attorney was a full transcript of the legislative proceedings (R. 354).

At the trial, the Government showed both by the testimony of the Committee counsel, Rudolph Halley, and by the legislative record, that the events set out above had occurred. In addition, the Government, to show that petitioner could have testified without danger to himself, introduced the testimony of Dr. Douglas Quick, petitioner's own physician, Miss Grace Myers, Dr. Quick's nurse, and Dr. John D. Kernan, who examined petitioner at the request of the Government on March 17, 1951.

Dr. Quick testified (R. 84) that on the basis of his examination of petitioner on March 16, that:

> * * * I talked to [petitioner] about saving his voice as much as possible; told him particularly not to put unnecessary stress on the voice, not force it to try to be heard in the presence of any confusion or anything of that sort. I

> told him to make answers that he might be required to make as short as possible, and that I perhaps repeated three or four times in the course of the actual treating of him. I told him that he ought not to take more than an hour or two if he could possibly avoid it.

Dr. Kernan testified, *inter alia,* that when he examined petitioner on March 17, his vocal chords were normal in appearance; and they would not have been so on March 17 if they had been inflamed on March 15 or March 16 (R. 108-111).

At the close of the Government's case, the petitioner moved for an acquittal (R. 187). As he declined to put on any case, the motion was directed to the whole case (R. 218). The motion was denied (R. 220). Petitioner declined to submit any instructions for submission to the jury (R. 220). And he declined to participate in summation to the jury (R. 220).

Petitioner was convicted on ten counts (R. 311). Counts 1, 3 and 4 were based upon his refusal to answer questions as to which he claimed the privilege against self-incrimination (R. 2-3, 25-26, 165-167). The Court of Appeals, holding that such claim should have been sustained, reversed the conviction on those counts. It also reversed petitioner's conviction on counts 7 and 9-11, each of which was based on petitioner's refusal to answer a specific question after he had refused to answer any questions at all (R. 426-427). The conviction

was sustained on counts 5, 6 and 8 described above (*supra*, pp. 4-5).

ARGUMENT

1. Petitioner's first contention is that the jury could not impartially have considered the evidence on the counts of the indictment on which his conviction was affirmed because of the evidence adduced, the arguments of the prosecution, and the language of the court's instructions, with respect to three of the counts of the indictment on which the jury returned verdicts of guilty, but as to which the Court of Appeals reversed. These counts related to questions which Costello refused to answer on the ground of possible self-incrimination. One of these questions, asked on March 13, 1951, was, "What is your net worth?" (Count 1.) The other two, asked on March 21, 1951, were, "Do you owe any sums of money in excess of $10,000 to any person?" (Count 3), and, "What is the total indebtedness, Mr. Costello?" (Count 4.)

Petitioner refers to remarks by the prosecutor in his opening and closing statements alluding to petitioner's "illegitimate business" and "criminal friends and associates" (Pet. 16). In addition, petitioner alleges that the instruction rejecting his claim of privilege as a matter of law, coupled with further instructions which told the jury to give consideration, in connection with the issue of petitioner's good faith (relevant only in connection with counts 5 through 11), "to the reasons given by

[him] for his acts, as well as the entire testimony of the defendant before the Committee, and the entire proceedings of the Committee which were had before the defendant", permitted the jury to infer that the rejected claim of privilege was relevant on the issue of good faith (Pet. 14-15).

There are at least three answers to petitioner's contentions in this regard.

(a) The trial court's instructions, when read as a whole, made very clear what the jury were required to find before they could convict petitioner on the various counts, and carefully separated the issues arising under counts 1, 3 and 4 from those arising under counts 5, 6 and 8 (R. 288-293). Thus, the court stated, by way of preface:

> You are to determine the guilt or innocence of the defendant as to each count separately and apart from all the others [R. 288].

And coming to the specific counts, it stated:

> You will first come to consider the guilt or innocence of the defendant on Counts 1, 3 and 4 [R. 289].

Then, after advising the jury that Costello's claim of privilege with respect to the questions set forth in counts 1, 3 and 4 was not valid and that the issues under those counts were whether the questions were asked, whether petitioner heard and understood them, and whether he failed to answer although he was physically and mentally able to do

so (as was conceded (R. 289-290), the court stated:

> You will next come to consideration of Counts 5, 6 and 8 [R. 291].

With respect to those counts, the court stated (R. 292), *inter alia:*

> You are charged that when the defendant appeared before the Committee he was required by law to remain in attendance and not to depart * * * without leave of the Committee so long as he was physically able to remain and so long as he was able to do so without reasonable basis for belief by him that his health would be seriously impaired.

It is true that the court later stated, as petitioner points out, that the jury, in determining petitioner's wilfulness should consider his "entire testimony * * * before the Committee" as well as the "entire proceedings of the Committee which were had before the defendant" (R. 292-293). But these remarks were expressly addressed to counts 5, 6 and 8. And they certainly did not permit the jury to infer that petitioner's claim of privilege with respect to the questions set forth in counts 1, 3 and 4, though wrong, could be considered on the issue of wilfulness involved in counts 5, 6 and 8.

The limited meaning of the court's language upon which petitioner relies was emphasized by what the court said in a supplemental instruction. After beginning its deliberations, the jury had inquired of the court whether Costello had "the right

to refuse to answer due to possible self-incrimination" (R. 305). To this, the court answered, *inter alia*, that (R. 306):

> * * * I have ruled as a matter of law—and you are bound to accept my ruling on that matter—that the defendant's claim of his constitutional privilege against being required to give evidence against himself or giving evidence which might tend to incriminate him with respect to these three questions, was not legally and lawfully asserted. That is, there was no basis in law, and I overruled his claim. You are required to accept that ruling of the Court.
>
> Now, I do, however, want to point this out to you, that the fact that the defendant did assert a constitutional privilege is in no way to be considered as evidence against him. We are concerned with the guilt of this defendant or his innocence only on the ten counts of the indictment, and you are not to consider the fact that he did claim immunity or claimed his constitutional privilege as a justification for refusing to answer the questions embraced in Counts 1, 3 and 4 in any way against him. I have overruled that claim. That ends the matter, and dismiss it entirely from your minds from thence on. Do not consider it with reference to any of the counts in the indictment as against the defendant.

This instruction, which clearly answers petitioner's objection, was made at a time when the jury were most likely to remember it.

(b) The basic difference between the issues raised under counts 1, 3 and 4 and those raised under counts 5, 6 and 8, makes it very unlikely that the jury would be confused. Since there was no doubt that the questions set out in counts 1, 3 and 4 had been asked petitioner, that the court had held them to be proper questions, and that petitioner had refused to answer them, the issue on those counts was very clear; and we may concede *arguendo* that the court's statement of the law was, as petitioner observes, tantamount to a directed verdict. But the observation proves too much. For it is precisely the simple and directive character of the instructions with respect to counts 1, 3 and 4 which makes it extremely unlikely that the jury did not deal with the issues under counts 5, 6 and 8 separately and in accordance with the court's instructions.

(c) Petitioner's present complaint is one which may arise whenever any two charges are tried together. There is often a possibility of prejudice to a defendant's chances of acquittal on a particular charge when he is tried at the same time on another related charge. If petitioner's position is sound, this may never be done, or at least, whenever a conviction on one charge is reversed for some error at the trial, the conviction on the other must likewise be reversed. There is no support for such a proposition. Compare *Miranda* v. *United States,* 196 F. 2d 408 (C.A. 9), petition for certiorari pending, No. 40 Misc., O.T. 1952; *Marzani* v. *United States,* 168 F. 2d 133, 138 (C.A.

D.C.), affirmed by an equally divided court, 335 U.S. 895.

Moreover, if such a possibility of prejudice as is here claimed exists, it would seem to be apparent even before trial. Here, for example, the defense must have planned before the trial to challenge the right of the Committee to insist on answers to the questions set out in counts 1, 3 and 4. Consequently, it seems to us that the objection, which is essentially one of improper joinder of offenses, was waived by Costello's failure to make it before trial (see Rule 12(b)(2), F. R. Crim. P.), or at least by his failure either to make his present objection at the conclusion of the instructions, or to request more specific instructions as to the separateness of the charges involved in the two sets of counts and the evidence which the jury could consider with respect to each set (Rule 30, F. R. Crim. P.).

2. Petitioner also contends that it was error to hold that he had obstructed the inquiry of the Committee within the meaning of 2 U.S.C. 192 because he appeared before the Committee several days after March 15 and 16 and answered all of the questions that he had earlier refused to answer, except those as to which the Court of Appeals held that he had properly exercised his privilege against self-incrimination.

The argument is plainly insubstantial. All other objections aside, it is obvious that to delay, on March 15 and 16, 1951, the work of a committee whose life is to expire on March 31, 1951 (R. 327),

is to obstruct it. If factual support for this is needed, there was explicit testimony by counsel for the Committee that the refusals of March 15 and 16 did in fact impede the Committee's hearings and interfered with "the timing and the sequence of questions and the sequence of calling witnesses" (R. 139).[1]

As in the case of criminal contempts, punishment under Section 192 is not designed to coerce answers. It is to vindicate the authority of the tribunal. Consequently, the fact that the witness finally answers is not important. Compare *United States* v. *Bryan*, 339 U.S. 323, 327, with *Gompers* v. *Bucks, Stove & Range Co.*, 221 U.S. 418, 451-452. See also *Duell* v. *Duell*, 178 F. 2d 683, 685 (C.A. D.C.); *Wilson* v *United States*, 65 F. 2d 621, 623 (C.A. 3); *Walling* v. *Crane*, 158 F. 2d 80, 83 (C.A. 5).

3. Petitioner challenges the exclusion of evidence, which he now claims was pertinent to the issue of good faith, relating to (1) his subsequent attendance at later committee hearings and answering of all proper questions and (2) the actual testimony before the committee of Dr. Panettiere, one of his physicians, with regard to his physical condition.

---

[1] The counsel also testified to the further obstructive effect which was just as real, even if less easily measurable:

"It further interfered with the Committee's work in that the Committee had a number of witnesses under subpoena, and that if Mr. Costello were permitted to answer questions when and where he chose and the other witnesses followed suit, the Committee would be completely unable to function" (R. 139).

(a) A preliminary and sufficient answer to petitioner's present position on this score is his own position in the trial court. There his counsel at all times contended that there were no issues of fact to be submitted to the jury, and that all issues in the case were issues of law. Counsel stated this prior to the trial (Tr., March 27, 1951, pp. 9-10, 31-32; March 28, 1951, pp. 46, 50) in his opening to the jury (R. 20) and on numerous occasions throughout the trial (R. 49, 62-63, 104, 187, 215, 216, 220). An example is the following colloquy which occurred between Costello's counsel and the trial court (R. 187):

> Mr. Spence: I do not claim that any factual issue should go to the jury.
>
> The Court: Well, apparently you have urged some. Assuming that I rule against you on the law, what factual issues do you want submitted to the jury?
>
> Mr. Spence: I see no factual issues for the jury, sir.

Specifically, petitioner's counsel stated that petitioner's illness was not a factual issue for the jury (R. 152), and that the Government's proof as to petitioner's condition was not contradicted by petitioner (R. 216); that "it is a straight question of law as to whether or not he terminated his appearance before the Committee" (R. 63); and that "the question of whether or not this was or was not a wilful default under the circumstances is a question for the Court" (R. 215). After being

informed by the court that it intended to submit the questions of petitioner's illness and honest belief as to his illness to the jury, counsel stated (R. 220):

> The defendant takes the position that he is unwilling to participate in the summation of this issue to the jury, and I state now that I do not desire to sum up or make any argument to the jury.

Counsel declined to submit any requests to charge (R. 220), though he had previously been apprised that in the absence of requests, the court would follow the charge it had given in the prior trial of this case (R. 183). Counsel thereafter formally waived summation (R. 223, 269).

In view of this record, there could be no basis, in the absence of egregious error, for petitioner now to question the manner in which the evidence was admitted and submitted to the jury. In an analogous situation, it was observed:

> Where parties, even in a criminal case, knowingly and deliberately adopt a course of procedure which at the time appears to be to their best interests, they cannot be permitted at a later time, after a decision has been rendered adverse to them to obtain a retrial according to procedure which they have voluntarily discarded and waived * * *.

Carruthers v. *Reed,* 102 F. 2d 933 (C.A. 8), and see *United States* v. *Rosenberg,* 195 F. 2d 583, 596, fn. 9 (C.A. 2), certiorari pending, Nos. 111, 112, O.T. 1952.

(b) But even assuming, for the purposes of argument, that petitioner is not foreclosed by his assertions of the nature of the issues in the trial court, he is foreclosed from contending that it was error to exclude these items of evidence for a purpose for which he never offered them.

Although his present suggestion is that the evidence of his subsequent appearance and answering was relevant to show that his refusals to answer on March 15 and 16, 1951, were in good faith, the evidence was never offered for this purpose. As a matter of fact, the record shows that petitioner did not offer before the jury any portions of the transcripts of the committee's proceedings on March 19, 20 and 21. The only thing he did in this regard was to ask one question of Mr. Halley, on cross-examination, concerning a comment that Senator O'Conor had made on March 19, that the committee would like to have the previously unanswered questions repeated, Senator O'Conor specifically quoting the question set forth in count 7 of the indictment (R. 129). Upon inquiry by the trial court, petitioner's counsel stated that the purpose of the interrogation was to show that petitioner, at the committee's request, had subsequently answered the question set forth in count 7, and thus that there had been no obstruction of the committee's investigation in this regard (R. 129-130). The trial court ruled as a matter of law that subsequent answering of the question did not purge the prior refusal, that the committee had not held that petitioner had purged himself, and that,

as a matter of law, there was a sufficient showing of obstruction (R. 130). The court made no ruling as to the admissibility of the evidence in question, but simply rejected these defenses as a matter of law. Petitioner did not thereafter seek to introduce any evidence in respect of his subsequent answering,[2] either on cross-examination or on his direct case, although the court had never ruled it out, and although he had subsequent opportunity to do so (R. 139-140, 180-181).

The stenographic transcript of the testimony given by Dr. Vincent J. Panettiere before the committee on March 16, 1951, was properly excluded. It was either hearsay or irrelevant. On March 15, 1951, the first day that petitioner refused to testify, he gave the committee a certificate from Dr. Panettiere, a copy of which was in evidence before the jury (R. 172). There was also testimony by Mr. Halley that on the afternoon of March 16, 1951, when petitioner appeared before the committee, he was informed that Dr. Panettiere had been a witness before the committee that morning, and had stated that petitioner could testify for a reasonable period (R. 41-42). At petitioner's request, the court instructed the jury that this evidence was to be considered as proof only of what the committee had told petitioner, and was not to be considered as proof of what Dr. Panettiere had said (R. 41).

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[2] It should be noted, however, that the jury had already been apprised that petitioner returned and testified at length on March 19, 20 and 21 (R. 46, 51-52).

Thereafter, petitioner introduced into evidence a portion of the transcript of his own appearance before the committee on March 16 (R. 127-128) which contained verbatim the statement of the chairman of the committee to petitioner concerning the doctor's testimony. Petitioner also introduced into evidence a letter from the chairman of the committee to him which stated that Dr. Panettiere had informed the committee that he could testify for a reasonable period, and, accordingly, that he was to appear before the committee at 2:00 p.m. that day (R. 124, 349, 350).

Subsequently, the Government introduced another portion of the transcript of the testimony of petitioner when he appeared before the committee on March 16. Included in this transcript was one brief statement by the committee to petitioner concerning Dr. Panettiere's testimony (R. 180). Mr. Halley had previously testified, in substance, to the contents of this statement, and it fell within the trial court's instruction limiting the probative effect of such evidence.

With this background, the trial court ruled out the transcript of Dr. Panettiere's testimony, offered only "as explaining the letter of the Chairman of the Committee" (R. 128), as follows (R. 183-184):

> * * * I am going to rule that it is not admissible. I have given consideration to it, and the only portion of it that I would deem admissible would be the certificate and we already have that marked. If the testimony of Dr. Panettiere is desired, he either may be

> presented as a witness by the defendant or someone must testify as to what he told the defendant and to what instructions he gave the defendant. Bearing upon whether or not the defendant's default was wilful, we are only concerned with what was conveyed to the defendant by testimony.

It is obvious that Dr. Panettiere's extra-judicial statement, concededly made out of petitioner's presence, was inadmissible. If the transcript was offered to prove the truth of the facts to which Dr. Panettiere testified, it was properly excluded as hearsay. If, on the other hand, as seems to have been the purpose, the transcript was offered to prove merely that Dr. Panettiere had made certain statements to the committee, without respect to their truth, it was irrelevant to the issue of petitioner's good faith unless petitioner had heard the testimony. But petitioner conceded that he was not present when Dr. Panettiere testified (R. 185), and he has at no time contended that he was informed of that testimony except by the committee to the extent set forth above.

4. Petitioner contends (Pet. 28-32) that the Senate Resolution 110 forwarded to the United States Attorney pursuant to 2 U.S.C. 194 *(supra,* pp. 3-4), made specific reference only to his refusal "to answer certain questions" and not to his refusal to answer any questions at all, and hence that he cannot be convicted of contempt on the latter ground. The argument is erroneous, both in its premise and its conclusion.

The Resolution certified to the United States Attorney a copy of the Committee's Report (S. Rep. No. 199, 82nd Cong., 1st sess; R. 354), and while it characterized the report as one dealing with "the refusal of Frank Costello to answer certain questions in response to subpena duly issued," it also directed the certification of "all the facts in connection therewith, * * * to the end that the said Frank Costello may be proceeded against in the manner and form provided by law" (R. 354). The report contained the complete transcript of Costello's appearances before the Committee on March 15 and 16, 1951, and although it, too, referred to his refusal to answer questions, it also recited that the Committee had, on March 17, discussed his "testimony and deportment" and had voted that he be cited for contempt (R. 358). It is obvious that the term "deportment" referred to Costello's conduct on March 15 and 16 which constituted the basis of the charges of default contained in counts 5, 6 and 8.

Thus, neither the Committee in its report nor the Senate in its resolution purported to decide, or to limit the grand jury in deciding, what charges, if any, should be brought against Costello as a result of his conduct before the Committee. The resolution simply referred the matter to the grand jury for such action as it might deem appropriate.

Moreover, the certification contemplated by Section 194 is not a substitute for an indictment, nor can it limit the scope of an indictment. Its only function is to call the attention of the appropriate

United States Attorney to the existence of a possible violation of which he might not normally be aware. After that, the matter is before the grand jury as is any other evidence of crime. Consequently, the terms of a certification by which the United States Attorney is informed as to the facts are of no concern to a contumacious witness.

The history of the legislation makes this clear. A section substantially the same as Section 192 was introduced in 1857 because a House committee had found itself unable adequately to deal with a contumacious witness. See Congressional Globe, 34th Cong., 3d sess., Part I, p. 404, *et seq.* In answer to fears of several members of the House that the bill conferred new and unprecedented powers upon the Congress, the proponents of the bill made clear that Congress was not in any way to prejudge the innocence or guilt of the contumacious witness but rather that all such powers were to be exercised in formal judicial proceedings (e.g., Cong. Globe, 34th Cong., 3d sess., Part I (1857), pp. 407, 427).

Thus, Congressman Orr, one of the key sponsors of the legislation stated:

> * * * after this bill has passed, this House will turn these matters over to the courts—tribunals which have the time, education, and facilities, for investigating such charges. This House cannot undertake to constitute itself a court to determine all these things, because it would consume too much of its time. [*Ibid.*, at p. 406.]

The substance of Section 194 was proposed from the floor of the House by Congressman Letcher, who stated:

> I desire to suggest the propriety of adding a third section to the bill, which will make it the duty of the Speaker of the House, or of the Clerk of the House, to report to the attorney for the District of Columbia any failure that may occur here under the law, in order that a prosecution may be instituted. [*Id.*, at p. 427.]

This proposal makes it clear that the purpose of what is now Section 194 was merely to create a formal method to make the facts available to the prosecuting agencies. Accordingly, a certification under Section 194 does not impose the limitations upon or conditions precedent to prosecution which petitioner urges.

It has even been held that no compliance with Section 194 is necessary to a prosecution under Section 192. See *United States* v. *Josephson*, 74 F. Supp. 958 (S.D. N.Y.), affirmed, 165 F. 2d 82 (C.A. 2), certiorari denied, 333 U.S. 838.

5. Finally, petitioner contends (Pet. 32-35) that the three counts of the indictment on which his conviction was sustained constitute only one contempt, so that it was error to impose separate punishment for three. Under the counts affirmed by the court below, petitioner received an aggregate sentence of 18 months' imprisonment and $2,000 in

fines[3] whereas the maximum punishment for a single offense under Section 192 is one year and $1,000 fine.

Petitioner relies upon cases which have held, in effect, that there is only one contempt when a witness refuses to answer several questions which call for substantially the same answer, even though there is in fact no right to refuse to answer any of them. See, e.g., *United States* v. *Yukio Abe*, 95 F. Supp. 991, 992 (D. Haw.); *Fawick Airflex Co.* v. *United Electrical R. & M. Wkrs.*, 92 N.E. 2d 431, 433 (Ohio App.). The rationale of such a position has no application here. Even if it is accepted that the impact of a refusal to answer a series of questions is not sufficiently different to justify separate penalties, this view would have no application in connection with contempts which have clearly separate impacts on the work of the tribunal.

Petitioner's refusal to answer any questions on March 15 (count 6) did not have the same effect on the committee's ability to perform its work as his later walkout that day (count 5). For so long as he was present, some technique might have been devised to enable him to testify without straining his voice (see R. 173, 177-178), the reason he asserted for refusing to testify. Moreover, the judge treated counts 5 and 6 as one offense (R. 318-319) and imposed only one punishment therefor. Peti-

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[3] He was sentenced to 6 months' imprisonment on counts 5 and 6, the sentences to run concurrently, and fined $1,000 on count 5, and $100 on count 6, but the latter fine was remitted. He was also sentenced to 12 months' imprisonment and to pay a fine of $1,000 on count 8. (R. 318-320.)

tioner's refusal to testify on March 16 (count 8) was clearly separate from his action on March 15, and not, as he claims, merely an adherence to a position previously taken. Even the medical testimony of two doctors which he adduced on the consecutive days was somewhat different. The committee made a fresh evaluation on the second day, March 16, of his claim of ill-health, and his refusal to abide by the committee's decision on that day was a new and separate act.

CONCLUSION

The questions presented were correctly resolved by the court below. Moreover, they are either lacking in substance or so peculiar to the facts of this case as to deprive them of general importance. None of them involves a conflict of decisions which should be resolved by this Court. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1952.

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IN THE

Supreme Court of the United States

October Term—1952

No. 329

FRANK COSTELLO,

Defendant-Petitioner,

—against—

UNITED STATES OF AMERICA,

Plaintiff.

PETITIONER'S REPLY BRIEF

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32 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

IN THE

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PETITIONER'S REPLY BRIEF

Concerning Point I of Petitioner's Main Brief

(b) The Government (at p. 14 of its brief) concedes *arguendo* that the trial court's instructions on the first three counts were tantamount to a directed verdict of guilt, but contends that "the simple and directive character of the instructions" reduced the likelihood of prejudice. But the Government loses sight of the fact that the very simplicity and directness of the instructions only aggravated the effect of the error, for the impact on the minds of the jurors was driven with surer and more forceful blows.

The Government misapprehends petitioner's position when it wrongfully assumes it to be that every partial re-

versal necessitates complete reversal. That is not our claim. The crucial question in each case is whether a defendant's right to a fair trial has been impaired and whether prejudice is fairly inferable. Unless the Government can establish with reasonable certainty that defendant was not prejudiced, the error is not to be overlooked. The Government cites (pp. 14-15) two cases on the point, and we believe that both of them fortify our argument.

In the first of these, *Miranda* v. *United States* (C.A. 9, 1952), 196 F. 2d 480, petition for certiorari pending No. 40 Misc., O.T. 1952, a prosecution for making false statements under oath, defendant was acquitted on certain counts and convicted on one. His principal contention on appeal was that he was prejudiced by the evidence on the counts as to which he was acquitted. In affirming the conviction, the Court held that defendant conceded the admissibility of the evidence relating to the counts on which he was acquitted "for the limited purpose of tending to show appellant's knowledge and intent in committing the acts alleged in count eight;" that the jury was accurately and fully instructed as to this limited purpose; and that *the very acquittal on the other counts persuasively demonstrated the lack of prejudice.* All of these factors are, of course, lacking herein.

In the other case cited, *Marzani* v. *United States* (C.A. D.C. 1948) 168 F. 2d 133, 138, the trial court had erroneously permitted certain counts to go to the jury that were barred by limitations. The charges were the making of false statements in a matter within the jurisdiction of a governmental agency (18 U.S.C.A. Sec. 80). In rejecting defendant's claim of resultant prejudice from the inclusion of the barred counts, the Court of Appeals decided (1) that no evidence was improperly admitted by reason of the

barred counts; and (2) the alleged false statements in the barred counts were the same as, or similar to, the statements involved in the counts properly on trial. *Neither of these distinguishing features is present in the case at bar.* On the contrary: (1) evidence under the reversed counts was received—and over strenuous objections (R. 159-160); and (2) the charges on the reversed counts were for contempts arising from different facts than those involved in the affirmed counts. As the Government indicates, the holding in the *Marzani* case was affirmed by the Supreme Court by a four-to-four vote (335 U. S. 895).

The tenor of both opinions strongly suggests that if the errors assigned had been predicated upon a situation as is here presented, the outcome would have been different.

The argument (p. 15) that the objection was "essentially one of improper joinder of offenses", is altogether without merit. From the standpoint of proper criminal pleading, there can be no question but that counts 1, 3 and 4 were properly joined with the other counts. However, the objection is not one relating to pleading, but instead involves solely the erroneous admission of prejudicial evidence upon trial.

Concerning Point III

(a) The Government takes the position (pp. 17-18) that because defendant's counsel maintained the absence of any issue of fact, there was a waiver of any claim of error predicated upon the improper exclusion of evidence.

We are aware of no rule of law that a defendant who insists—however strongly—that the facts fail to constitute a crime, is thereby foreclosed from assigning errors arising during the trial—even though such errors relate to rulings

bearing upon the admissibility of evidence. The attitude of trial counsel as to whether or not the case presented factual issues is of no moment on the question of reversible error on the exclusion of such evidence. It was counsel's right and duty to press his legal contentions with all possible vigor; and by so doing he can not be charged with waiver of other available error. It may be pertinent to observe that the Court of Appeals in large measure has vindicated the correctness of counsel's position by reversing seven of the ten counts on the same grounds which were persistently urged by him below.

Even if counsel erred in arguing that the three remaining counts presented no factual issues for the jury, does it follow that the defendant in consequence may be denied a fair trial of those counts and that he has forfeited all recourse to appeal? Surely that is not the effect of *Carruthers* v. *Reed* (C.C.A. 8, 1939) 102 F. 2d 933, cited by the Government (p. 18) as "*an analogous situation.*" In that case the attorney for defendants who were negroes charged in Arkansas with rape, after deliberate consideration determined not to challenge the jury by motion to quash because of the exclusion of negroes from both grand and petit juries; and it was there held that the point was not subsequently available on federal habeas corpus, especially since under the law of Arkansas a challenge to the panel was necessary before the jury was sworn.

The Government also refers (p. 18) to *United States* v. *Rosenberg* (C.A. 2) 195 F. 2d 583, 586, ftn. 9, to support its claim of waiver. That case holds that a defendant's failure to object to the reception of hearsay evidence, except in egregious cases, bars reliance thereon as error—a situation in no manner comparable to the instant case,

which involves the exclusion of pertinent and material evidence offered by the defendant.

Nor is it entirely accurate for the Government to say (p. 18) that "counsel declined to submit any requests to charge," for at the conclusion of the instructions there was some colloquy in the course of which (R. 296-300) counsel made various specific requests on the issues which the jury was to consider.

CONCLUSION

For the reasons stated in the petition and the arguments set forth in the main brief, the application for a writ of certiorari should be granted.

Dated: New York, N. Y., October 15, 1952.

Respectfully submitted,

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No. 329

IN THE

Supreme Court of the United States

October Term—1952

FRANK COSTELLO,

Defendant-Petitioner,

—against—

UNITED STATES OF AMERICA,

Plaintiff.

PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE WOLF,
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32 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

IN THE

Supreme Court of the United States

October Term—1952

FRANK COSTELLO,
Defendant-Petitioner,

—against—

UNITED STATES OF AMERICA,
Plaintiff.

PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above-named defendant-petitioner respectfully prays for a rehearing of his petition for a writ of certiorari, which petition was denied by this Court on November 10, 1952.

Petitioner was convicted upon ten counts of contempt of a Committee of the United States Senate, and sentenced to 18 months imprisonment and fines totaling $5,000. Upon appeal to the United States Court of Appeals, Second Circuit, the conviction was reversed as to seven counts and affirmed as to three, the latter carrying the total sentence. The reversal was predicated upon petitioner's lawful assertion of privilege against self-incrimination in several instances and upon the improper multiplication of contempts in others.

The original petition presented substantial points of law, including the following: (1) The Court of Appeals correctly held that three counts (as to which the privilege against self-incrimination was applicable) should never have been submitted to the jury. Nevertheless, everything that was said, argued and charged on these counts was of a character as gravely to prejudice the fair and dispassionate consideration of the other counts. Petitioner is entitled to a trial free from and unaffected by these harmful matters. (2) Petitioner's prompt testifying cancelled any initial refusal and negatived any possible claim of obstruction, so that there could be no contempt. (3) Evidence strongly tending to show good faith and to rebut any element of wilfulness was erroneously excluded. (4) The prosecution improperly was extended to alleged acts outside of the scope of the Senate resolution and certification which constituted the legal limits of permissible indictment. (5) The sentence exceeded the penalty permitted by the statute.

Petitioner asks the Court to reconsider and re-examine the foregoing contentions, any one of which, if sustained, would operate to vitiate the conviction. None of the errors complained of is to be deemed technical, the majority of them being addressed squarely to the fundamental issue of guilt or innocence, while simultaneously subject to appellate correction—as distinguished from any factual argument.

An examination of the lengthy record in its entirety cogently suggests that petitioner was innocent of all the offenses charged. This becomes particularly apparent when the unusual statutes under which the conviction was had (2 U. S. C. A. Secs. 192 and 194) are scrutinized Section

192, dealing with witnesses summoned by authority of either House, creates two classes of offenses. One is where a witness "wilfully makes default;" the other is where a witness "refuses to answer any question pertinent to the question under inquiry" The sustained counts herein relate to the first classification, namely, where the witness wilfully makes default. Section 194 requires certification to the appropriate prosecutor in three classes of cases: whenever a witness "fails to appear to testify," "fails to produce any books, papers, records, or documents, as required," or "refuses to answer any question pertinent to the subject under inquiry." A comparison of the statutes with the facts in the instant record is strongly indicative that petitioner did not wilfully make default (denounced by Section 192); and that he never unlawfully did anything for which there could be any proper certification under Section 194.

The discrepancy between the facts and the statutes is further emphasized by the circumstance that the Court of Appeals' consideration of the case may well have been affected by the fact that that tribunal apparently proceeded under the language of Section 194 prior to its amendment in 1936 and 1938. As was pointed out in a footnote of the original petition (although perhaps insufficiently stressed), the Court of Appeals actually quoted Section 194 in full in its opinion as that statute had read before the amendments. The old law called for certification "whenever a witness summoned as mentioned in section 192 of this title fails to testify," and the only condition for certification was that "the facts are reported to either House." Under the amendments there must be a report and filing of "a statement of fact constituting such failure." These changes

tend to sustain petitioner's argument calling for deliberative rather than routine action by the Senate as a condition pre edent to possible prosecution. In any event, where the course of events is susceptible of subtle inferences, petitioner was entitled at the very least to have his cause determined by the statutes as they exist and not as they once were.

As has heretofore been mentioned, this entire prosecution has been one *ad hominem* rather than *ad delictum*. That the indictment herein should be made an instrumentality for punishing petitioner for matters outside of its proper scope is abhorrent to fundamental notions of justice. Petitioner seeks merely the same consideration that would be accorded to any other individual. This Court has unfailingly recognized that right and has dedicated itself to the preservation of the Aristotelian doctrine that "The only stable state is the one in which all men are equal before the law" (Politics, Ch. V).

For the foregoing reasons, as well as those set forth in the original petition, petitioner respectfully asks for a rehearing and reconsideration of his petition, and that upon such rehearing the application for a writ of certiorari should be granted.

Dated: New York, N. Y., November 24, 1952.

Respectfully submitted,

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